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Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-701

CAPERS G. BARR, JR., Individually and As General Manager, South Carolina State Ports Authority, and SOUTH CAROLINA STATE PORTS AUTHORITY,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioners pray that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fourth Circuit in the case of *United States of America* v. *Capers G. Barr, Jr., et al.*, Docket Number 71-2044, filed September 15, 1972.

OPINIONS BELOW

The final Judgment of the United States Court of Appeals for the Fourth Circuit, filed September 15, 1972, is not yet reported and is printed as Appendix A to this Petition. (A. p. A1). The previous Judgment of the United States District Court for the District of South Carolina, Charleston Division, styled *United States of America* v. *Capers G. Barr, Jr., et al.*, Civil Action No. 70-548 (D. S.C. 1971) is apparently also not yet reported and is printed as Appendix B to this Petition. (A, p. A3).

JURISDICTION

The jurisdiction of this Honorable Court to review the Judgment of the United States Court of Appeals for the Fourth Circuit, filed September 15, 1972, is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Did the Court of Appeals err by affirming the District Court's refusal to determine whether the South Carolina State Ports Authority is a "carrier" within the meaning of 45 U.S.C. §151 First of the Railway Labor Act and, therefore, under the jurisdiction of the National Mediation Board?

2. Did the Court of Appeals err by affirming the District Court's judgment directing the South Carolina State Ports Authority to make available to the National Mediation Board certain books and records in order for said Board to proceed to make an "investigation" of the South Carolina State Ports Authority under 45 U.S.C. §152 Ninth of the Railway Labor Act?

STATUTORY PROVISIONS INVOLVED

Railway Labor Act

45 U.S.C. §151 First, provides in pertinent part:

The term "carrier" includes any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad . . . .

* * *

45 U.S.C. §152 Ninth, reads:

If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification, the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the

Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated, the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

STATEMENT OF THE CASE

The South Carolina State Ports Authority (hereinafter referred to as the "Authority") was created by an Act of the General Assembly of the State of South Carolina solely for the purpose of operating the State's ports. South Carolina Code Annotated, Sec. 54-1 *et seq.* (1962). The primary function of the Authority is loading, unloading and storing of cargo carried by ocean-going vessels which berth at the Authority's docks. The Authority has, until recently, had the sole responsibility for operating two terminal railroads in Charleston, South Carolina. These terminal railroads, however, have been operated only as incidental to the Authority's overriding function of operating its port facilities in that city. For example, only about

thirty-five employees out of a total work force of approximately three hundred employees perform jobs which are related to the operation of these two terminal railroads.

In November, 1968, the International Longshoremen's Association, AFL-CIO (hereinafter referred to as the "ILA"), petitioned the National Mediation Board (hereinafter referred to as the "Board"), for an investigation of a representation dispute which allegedly existed among certain employees of the South Carolina State Ports Authority at its facilities located in Charleston, South Carolina.

The ILA, in its petition, alleged that the representation "dispute" involved employees of the Authority performing duties described as unloading, loading, warehousing, moving, storing, checking, clerking, handling cargo, maintaining equipment, engineering locomotives, switching, and all others engaged in the handling or moving of cargo. Thus, the ILA asked the Board to assert jurisdiction not only over the employees connected with the two terminal railroads, but also over the Authority's employees who had no such connection. Following a preliminary investigation, the Board held a hearing on August 13, 1969, at which the Attorney General of the State of South Carolina moved to dismiss the proceeding on the grounds that the Board had no jurisdiction over the Authority under the Railway Labor Act (hereinafter referred to as the "Act"). On November 4, 1969, the Board issued its "Findings Upon Investigation" in which it determined that it did, in fact, have jurisdiction over the Authority, and that a further investigation was necessary to determine appropriate employee groupings for craft or class purposes. The Board also allowed the ILA to amend its petition to exclude from the alleged representation dispute the Authority's railroad employees, who were already repre-

sented by other labor unions. When the Board sought to pursue its investigation, the Authority would not allow the Board's representatives to examine the Authority's books and records. This refusal was based on the Authority's belief that it is not subject to the jurisdiction of the Railway Labor Act.

Following the Authority's denial of the Board's demand for access to certain records and books, a Motion for Summary Judgment was filed in United States District Court by the United States of America against the Authority and the individual who was then General Manager of the Authority, Capers G. Barr, Jr. This Motion for Summary Judgment sought a mandatory injunction ordering the Authority to make the demanded books and records available to the Board. On August 30, 1971, the District Court granted the Motion of the United States and denied the Authority's cross-motion for summary judgment dismissing the action for lack of jurisdiction by the Board.

The Authority appealed the District Court's decision to the United States Court of Appeals for the Fourth Circuit. The Fourth Circuit affirmed the District Court's refusal to consider the question of the Board's jurisdiction over the Authority, as well as the District Court's order requiring the Authority to make the relevant books and records available to the Board for inspection.

REASONS FOR GRANTING THE WRIT

I. The Failure by the National Mediation Board and the Courts Below to Properly Apply Well-Established Judicial Precedent in Forcing the Authority to Turn Its Records Over to That Board, in the Absence of a Proper Finding That Said Board Has Jurisdiction Over the Authority, Constitutes Such a Radical Departure from the Accepted and Usual Course of Judicial Proceedings As to Call for an Exercise of This Court's Power of Supervision.

A. The "Common Control" Theory As Applied by the Board.

Had the District Court properly considered the question of whether the Board had jurisdiction, that Court should have determined that the Board lacked jurisdiction over the Authority's employees who are unconnected with the two terminal railroads which serve the Authority's port facilities in Charleston, South Carolina.

The Board determined that it had jurisdiction over the Authority because it came within the statutory definition of a "carrier" under the Railway Labor Act, which reads in pertinent part:

> "The term 'carrier' includes . . . any company which is . . . under *common control* with any carried by railroad . . . ." 45 U.S.C. §151 First (Emphasis supplied)

Thus, the Board's reasoning is simply that since the Authority apparently "controls" the two terminal railroads at its port facilities located in Charleston, South Carolina, all other facilities and employees which are likewise con-

trolled by the Authority, even though they are totally unconnected or integrated with the terminal railroads, are subject to the Railway Labor Act and the National Mediation Board. This represents but another "power play" by the federal bureaucracy. What makes this so serious is that, in the case at bar, the power play by the Board significantly encroaches on the rights of the State of South Carolina.

There is little authority to support the Board's argument that, since the Authority controls the two terminal railroads, everything else under control of the Authority is also subject to the Board's jurisdiction. Congress surely never intended to give the Board such sweeping power to satisfy its apparent growing appetite.

The Petitioner is well aware of *California* v. *Taylor*, 353 U.S. 553 (1957) where the Court held that, merely because a railroad is owned and operated by a State, it is not exempt from the Railway Labor Act. Moreover, the principle of *California* v. *Taylor* was drafted into the South Carolina State Code of Laws as an exception to the State's policy prohibiting its political subdivisions, instrumentalities and agencies from bargaining collectively with labor organzations. 1962 South Carolina Code of Law, Sec. 54-21. In fact, the Authority currently recognizes certain labor organizations as the representatives of its railroad employees and is signatory to collective bargaining agreements covering these employees. But the *Taylor* case does say that Congress intended that the provisions of the Railway Labor Act should be applied to cover state employees whose duties are not directly related to or totally integrated with the state-owned and operated railroad. In fact, the following language in the *Taylor* case indicates the contrary:

> "The Railway Labor Act is essentially an instrument of industry-wide government. The railroad world for which the Act was designed has been described as 'a state within a state'. Its population . . . has its own customs and its own vocabulary, and lives according to the rules of its own making . . . . Congress has not only carved this singular industry out of the Labor Management Relations Act of 1947, 61 Stat. 156, 29 U.S.C. Sec. 182, but it has provided, by the Railway Labor Act, techniques peculiar to that industry." *California* v. *Taylor*, 353 U.S. 553, 565-566 (1957)

What the *Taylor* case does say is that, if a state elects to go into the railroad business, it is not immune from federal laws, such as the Railway Labor Act, which regulate that industry. In the instant case the Board, with the sanction of the courts below, combined the *Taylor* principle with the "common control" theory to acquire jurisdiction of Ports Authority employees who are totally unconnected with the two terminal railroads which the Authority operates as incidental to its overriding port functions. It may not be long before the National Mediation Board, using such rationale, targets a state which owns and operates a railroad and that Board asserts jurisdiction over employees working in other state agencies, such as the state's highway department, on the theory of "common control". Congress never intended to give the National Mediation Board such powers to expand its own jurisdiction, especially where such expansion involves employees of states who are totally unconnected with the railroads in question.

B. Lack of Requisite Control of the Railroads.

There is an equally cogent reason why the District Court, had it properly considered the question of the Board's jurisdiction, would have found that the Board

lacked Railway Labor Act jurisdiction over the Authority's employees who are unconnected with the two terminal railroads.

The "control" over the two terminal railroads which service the Authority's port facilities in Charleston, South Carolina, is currently in a state of flux. On July 14, 1969, the Governor of South Carolina signed a bill, which had been passed that year by the South Carolina General Assembly, creating the "South Carolina Public Railways Commission", and ordering that the Authority transfer all incidents of "control" over its two terminal railroads to this newly-created Commission as soon as practicable. *South Carolina Stats. at Large,* Act. No. 456, p. 810 (1969). This statute further provides that this new Commission shall operate, maintain and "control" the tracks and equipment transferred to it. *Id.* at Section 6, p. 812. The Commission members were appointed by the Governor of South Carolina on or about October 31, 1972. The South Carolina Public Railways Commission, therefore, has now been set up and one of its statutory functions is to operate and control the two terminal railroads now serving the Authority. The statute makes it clear that the only control which the Authority now has over the two terminal railroads is to transfer them to the new South Carolina Public Railways Commission. The type of "common control" which Congress intended in wording the jurisdictional provisions of the Railway Labor Act [45 U.S.C. §151 First] could not have included a situation where such control was in the very real process of being transferred from one instrumentality of the State to another.

II. The Decision Below Represents a Departure from Well-Recognized Principles of Judicial Review by Federal Courts of Administrative Agency Action.

The District Court below refused to consider the question of the National Mediation Board's jurisdiction over the Authority, by stating:

> "It is not this Court's function to determine whether or not defendant Ports Authority is a carrier within the meaning of 45 U.S.C. §151 First of the Railway Labor Act."

In so holding, the District Court relied exclusively on a series of cases in the Fifth Circuit involving the Alabama State Docks Department. *United States* v. *Feaster*, 330 F.2d 671 (5th Cir. 1964); 376 F.2d 147 (5th Cir. 1967), *cert denied*, 389 U.S. 920, 410 F.2d 1354 (5th Cir. 1969), *cert. denied*, 396 U.S. 962.

In the 1967 *Feaster* case, the Fifth Circuit was faced with a situation, similar to the one at bar, in which the National Mediation Board was seeking access to the books and records of the Alabama State Docks Department. In that case the Fifth Circuit found that the District Court committed error in refusing to force the Docks Department to make its records available to the Board. The Fifth Circuit also stated that in such agency records access cases, the narrow question is simply whether the evidence sought is "plainly incompetent or irrelevant to any lawful purpose" of the agency, and not whether the Board had jurisdiction over the entire Docks Department.

In the case at bar, the Petitioner argued to both the District Court and the Court of Appeals that "control" of the two terminal railroads was in a state of flux because of the creation of the new South Carolina Public Railways

Commission. Had the lower courts properly considered this lack of control, they would have determined that the Board clearly lacked jurisdiction and that the Authority's records and books to which the Board seeks access, were therefore, plainly incompetent and irrelevant to any lawful purpose, insofar as they apply to the Authority's employees who are unconnected with the two terminal railroads. Thus, even if the District Court had properly applied the *Feaster* standard concerning Board access to records, it should have denied such access under the facts of this case.

In our case, the Fourth Circuit agreed with the District Court's finding that the question of the Board's jurisdiction over the Authority should be determined only after administrative remedies have been exhausted. In affirming on this point, the Fourth Circuit relied on the "third" *Feaster* case from the Fifth Circuit, 410 F.2d 1354 (5th Cir. 1969), *cert. denied*, 396 U.S. 962. There the court stated that while there could possibly be judicial review concerning the Board's jurisdiction, this issue was not "ripe" for such judicial review until after the Board had "certified" the results of its investigation of the representation dispute; *e.g.*, certified a union as the authorized representative of the employees on the basis of a Board-conducted election. In that *Feaster* case, however, the Fifth Circuit recognized three exceptions to this "ripeness" or exhaustion principle of judicial review concerning agency determinations. The third such exception to this exhaustion doctrine which the court recognized was developed in *Leedom* v. *Kyne*, 358 U.S. 184 (1958). Under this exception the Fifth Circuit stated that the issue of the National Mediation Board's jurisdiction could be judicially reviewed, prior to exhaustion of administrative remedies:

". . . only if the Mediation Board's determination is infused with error which is of a *summa* or *magna* quality as contraposed to decisions which are simply *cum* error." *United States* v. *Feaster,* 410 F.2d 1354, 71 LRRM 2218, 2228 (5th Cir. 1969), *cert denied,* 396 U.S. 962.

While the facts in the *Feaster* case might not have qualified it for the *Leedom* v. *Kyne* exception, the facts in the case at bar do qualify it for such treatment. The fact that the General Assembly of the State of South Carolina has set up an independent state agency, the South Carolina Public Railways Commission, to operate and control the two terminal railroads serving the Authority, brings our case within the *Leedom* doctrine. With the knowledge that the South Carolina State Ports Authority no longer has the requisite "control" over the two terminal railroads, the National Mediation Board's insistence that it has jurisdiction in an obvious and gross misapplication of the jurisdictional provisions of the Railway Labor Act. It should be obvious to the Board that since the Authority no longer has the requisite "control" of the railroads, the Board no longer has jurisdiction of the Authority's employees who are unconnected with the railroad. The Fourth Circuit, therefore, should have decided that the District Court should have reviewed the question of the Board's jurisdiction of the Authority. In deciding otherwise, the Court of Appeals departed or disregarded the well-established *Leedom* v. *Kyne* exception to the doctrine of exhaustion of administrative remedies.

CONCLUSION

For the foregoing reasons the administrative determination of the National Mediation Board, that it does have jurisdiction over the South Carolina State Ports Authority, is judicially reviewable. If the District Court had properly considered this issue, it would have found that the Board lacked such jurisdiction and that the Authority need not make its books and records available to the Board. In sanctioning the District Court's failure to review the Board's determination of jurisdiction and the District Court's order that the Authority make its records available to the Board, the United States Court of Appeals for the Fourth Circuit departed from well-established precedent. The United States Supreme Court should exercise its power of supervision to preserve this precedent and to protect the relationship between the federal government and the various states.

Respectfully submitted,

By .....

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 71-2044

United States of America,
Appellee,

v.

Capers G. Barr, Jr., Individually and as General Manager, South Carolina State Ports Authority, and South Carolina State Ports Authority,
Appellants.

Appeal from the United States District Court for the District of South Carolina, at Charleston.
Charles E. Simons, Jr., District Judge.

(Decided September 15, 1972.)

Before WINTER, CRAVEN, and BUTZNER, Circuit Judges.

Ellison D. Smith, IV, on brief for Appellants; L. Patrick Gray, III, Assistant Attorney General, John K. Grisso, United States Attorney, Alan S. Rosenthal, and Eloise E. Davies, Attorneys, Department of Justice, on brief for Appellee.

PER CURIAM:

On November 15, 1968, the International Longshoremen's Association, AFL-CIO, invoked the services of the

National Mediation Board pursuant to 45 U.S.C. § 152 Ninth in order to have the Board investigate a representation dispute among certain employees of the South Carolina State Ports Authority. The Board conducted a preliminary investigation, and determined that it had jurisdiction over the dispute and the Ports Authority, since the Ports Authority was a "carrier" within the meaning of the Railway Labor Act, 45 U.S.C., § 151 First. Notwithstanding this determination, the Ports Authority refused to cooperate in the investigation, and it would not make available to the Board certain books and records containing information essential to the investigation. The United States then instituted the present action in the district court seeking to compel the Port Authority to make these books and records available to the Board.

The district court held that it was not its "function to determine whether or not the defendant, Ports Authority, is a carrier within the meaning of 45 U.S.C. § 151 First of the Railway Labor Act," and the court further held that its inquiry was limited to a determination of whether or not the documents in question were "plainly incompetent or irrelevant to any lawful purpose of the National Mediation Board." The court thereupon entered an order requiring the Ports Authority to make the relevant records available to the Board and this appeal followed.

We agree with the district court. There will be time enough to determine the question of whether the Ports Authority is a "carrier" (*see* International Longshoremen's Association, AFL-CIO v. North Carolina Ports Authority, ... F.2d ..... (4 Cir. June 29, 1972) after administrative remedies have been exhausted. United States v. Feaster, 410 F.2d 1354 (5 Cir.) cert. den. 396 U.S. 962 (1969).

AFFIRMED

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

United States v. Capers G. Barr, Jr., *et al.*

Civil Action No. 70-548

SIMONS, District Judge:

This is an action to compel defendants to make available certain books and records to plaintiff. The case was tried before me without a jury at Charleston, South Carolina, on June 1, 1971. I have carefully considered all of the pleadings, evidence submitted, and arguments of counsel and, in compliance with Rule 52(a) of the Federal Rules of Civil Procedure, I find the facts specially and state my conclusions of law as follows:

1. Plaintiff is the United States of America. Defendant Barr is General Manager of the South Carolina State Ports Authority. Defendant South Carolina State Ports Authority is an instrumentality of the State of South Carolina.

2. On November 15, 1968, the International Longshoremen's Association, AFL-CIO, applied, pursuant to 45 U.S.C. 152 Ninth, to have the National Mediation Board investigate a representation dispute among all employees of the Ports Authority at Charleston, South Carolina, "engaged in loading, unloading, warehousing, moving, storing, checking, clerking and handling of cargo, operating and maintaining equipment and facilities, locomotive engineering, switching and all others engaged in the handling or moving of cargo." The application was subsequently amended to exclude railroad employees presently represented by other labor organizations.

3. The National Mediation Board appointed a mediator to conduct a preliminary investigation. Also, the Board conducted a public hearing on August 13, 1969, to determine whether it had jurisdiction over the representation dispute.

4. On November 4, 1969, the Board released its findings, wherein it determined that it had jurisdiction over the dispute and the Ports Authority, and that its investigation would be continued.

The Board noted the facts that the Ports Authority facilities contain terminal railroads which are operated as an integral part of such facilities. The operation of these terminal railroads includes the movement of freight to and from freight cars owned by interstate carriers, the switching of railroad cars and the storage of freight moved in interstate and foreign commerce. Accordingly, the Board found that it had jurisdiction to resolve the representation dispute and the Ports Authority is subject to the Railway Labor Act.

5. Notwithstanding the Board's findings and its decision to continue its investigation, the defendants have refused to grant access to its books and records to the Board.

CONCLUSIONS OF LAW

1. The court has jurisdiction of the parties and of the subject matter of the action. 28 U.S.C. 152 Ninth.

2. It is not this court's function to determine whether or not defendant Ports Authority is a carrier within the meaning of 45 U.S.C. 151 First of the Railway Labor Act. *United States* v. *Feaster*, 330 F. 2d 671, 56 LRRM 2018

(C. A. 5 1964); 376 F. 2d 147, 65 LRRM 2087 (C. A. 5 1967), cert. denied, 389 U.S. 920, 66 LRRM 2370; 410 F. 2d 1354, 71 LRRM 2218 (C. A. 5 1969), cert. denied, 396 U.S. 962, 72 LRRM 2866.

3. The scope of this court's inquiry in this instance is limited to a determination of whether or not the documents sought are plainly incompetent or irrelevant to any lawful purpose of the National Mediation Board. *United States* v. *Feaster, supra.*

4. The Board has submitted sufficient proof to establish that its request for access to the books and records of the Ports Authority is not incompetent or irrelevant to the Board's purpose, and not arbitrary, capricious or without foundation.

ORDER

Judgment should be entered directing defendants to make available to the National Mediation Board, or such representatives as it may designate, within 10 days from the entry of this Order, such books and records of the South Carolina State Ports Authority as may be deemed necessary by the National Mediation Board to carry out the purposes and provisions of 45 U.S.C. 152 Ninth and to permit representatives as it may designate to make copies of such books and records.

AND IT IS SO ORDERED.